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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 563

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. COSTENZE P. VALENTI, on the petition of GILBERT S. ROSENTHAL,

Appellant,

—against—

JOHN J. McCLOSKEY, Sheriff of the City of New York, etc., and COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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INDEX

	PAGE
Preliminary Statement	1
The Commission	3
The Constitutional Provisions and Statutes Involved	4
The Facts	4
The Apalachin Meeting	4
The Commission's Hearings	5
Appellant's Conduct at His First Hearing Before the Commission	6
Appellant's Conduct at His Second Hearing Before the Commission	8
Appellant's Conduct at His Third Hearing Before the Commission	10
Argument:	
POINT I—The appeal is moot and premature	11
A. The Appeal is Moot	11
B. The Appeal is Premature	12
POINT II—The Federal questions here alleged by appellant were never raised nor passed upon in the New York Courts	12
POINT III—Appellant's basic dispute is with a factual determination against him by the State courts and does not involve a Federal question	13
POINT IV—In any case, the alleged Federal questions are not substantial or worthy of consideration by this Court	15
Conclusion	19

Authorities Cited

Cases:

	PAGE
Bowe v. Scott, 233 U. S. 658 (1914)	13
Castellano v. Commission of Investigation, 360 U. S. 930 (1959)	3
Castellano v. Commission of Investigation, 361 U. S. 7 (1959)	13
Commission of Investigation v. Lombardozzi, et al., 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), aff'd without opinion 5 N. Y. 2d 1026 (1959)	3, 8
Ex Parte Hudgings, 249 U. S. 378 (1919)	18
Live Oak Water Users Ass'n v. Railroad Commission of California, 269 U. S. 354 (1926)	12
Mancuso v. Commission of Investigation, 361 U. S. 10 (1959)	3
Osborne v. Clarke, 204 U. S. 565 (1907)	13
Oxley Stave Company v. Butler County, 166 U. S. 648 (1897)	12
Penfield v. Securities & Exchange Commission, 330 U. S. 585 (1947)	15
People ex rel. Bulk v. Sheriff, 258 N. Y. 437 (1932)	15, 17
People ex rel. Valenti v. McCloskey and The Commission of Investigation (this case), 6 N. Y. 2d 390 (1959)	2, 17

Statutes:

PAGE

Federal:

Title 28, United States Code, Section 1257 (2) 12, 49

New York:

Civil Practice Act, Section 406 ..... 2, 7, 11, 14, 16

Laws of 1958, Chapter 989 (The Act Establishing This Commission) 3, 4, 7

Miscellaneous:

First Report of the New York State Crime Commission, Leg. Doc. No. 23 (1953) 3, 4

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To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, entered July 24, 1959, affirming dismissal of a writ of habeas corpus

brought on behalf of appellant, and affirming an order of the Appellate Division of the Supreme Court, First Department, to the same effect (877).* That Court had unanimously affirmed, with an opinion by Breitel, *J.*, (889, *et seq.*), a similar order of the Supreme Court of New York County, entered March 26, 1959 (28). In that Court appellant had sought his release from commitment resulting from his appearance as a witness before the Commission of Investigation of the State of New York. The Commission had refused to consent to his release on the ground of the nature of appellant's responses.

The Courts of New York all held for that reason appellant should not be released.

The opinion of the Supreme Court, New York County, Nathan, *J.* is reported as *People ex rel. Valenti v. McCloskey, and Commission of Investigation*, 17 Misc. 2d 695, 186 N. Y. S. 2d 798 (S. C. N. Y. Co., 1959). Mr. Justice Breitel's opinion is reported at 8 A. D. 2d 74, 185 N. Y. S. 2d 952 (1st Dept. 1959); the affirmance by the Court of Appeals is reported at 6 N. Y. 2d 390 (1959) (and see Jurisdictional Statement, Appendix "A", page 15).

Appellant originally had been committed to jail pursuant to an order and warrant issued under the authority of Section 406, New York Civil Practice Act, for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting" held in the State of New York at Apalachin, Tioga County. The validity of appel-

* Numbers in parentheses refer to folio numbers in the consecutive record on appeal to the New York Court of Appeals in the proceeding *People ex rel. Valenti v. McCloskey and Commission of Investigation*, [illegible]

lant's initial commitment was upheld in *Commission of Investigation* v. *Lombardozzi, et al. (C. P. Valenti)*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959); certiorari was denied and appeals dismissed in the various companion cases brought to this Court. See, e. g., *Castellano* v. *Commission of Investigation*, 360 U. S. 930 (1959); *Mancuso* v. *Commission of Investigation*, 361 U. S. 10 (1959).

It is the position of the Commission that this Court has no jurisdiction in this matter and, in any event, the arguments raised by appellant were properly decided by the New York courts, and are not substantial or worthy of consideration by this Court. The appeal should be dismissed.

The Commission

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were followed closely by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.

> This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities'. The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

> "Section 2(1)(a). The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering*;
>
> "(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> "(c) Any matter concerning the public peace, public safety and public justice." (Italics added).

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in Appendix "B" to the Jurisdictional Statement at pages 33, *et seq.*

The Facts

The Apalachin Meeting

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara, Sr. in Apalachin, Tioga

County, New York, a large number of persons who reside in various sections of this country and abroad. Appellant is a New York resident and was among this group.

Over 62 persons have been identified publicly as attending the meeting; it has come to be referred to as the "Apalachin Meeting". Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a November Thursday—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958. The subpoena by which appellant and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not

limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.*" (Italics added).

At the outset of the hearings, the Chairman of the Commission introduced and gave to appellant an opening statement which set forth the purposes of the hearing in considerable detail. As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings; the resolution again set forth the purpose and subject matter of the investigation. Appellant has been represented by counsel throughout all the Commission and court proceedings.

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Appellant's Conduct at His First Hearing Before the Commission

An individual hearing was held for appellant before the Commission on August 19, 1958. A similar pattern of events occurred regarding appellant and the other witnesses during their respective Commission hearings in August of that year.

Questions were directed to appellant by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at, the Apalachin Meeting". Other than merely identifying himself, appellant refused absolutely to

answer all questions. His refusals were based on his privilege against self-incrimination.

Acting under the authority of Section 7 of its Act, Section 7057, New York Unconsolidated Laws, and in accordance with Section 2447 of the New York Penal Law, the Commission thereupon voted to confer and did confer immunity upon appellant. The Commission's action and the effect of its decision regarding immunity were explained to appellant as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission. After this instruction the same questions were directed to appellant by the Commission. Appellant again refused to make any answer. On behalf of the Commission the Chairman specifically directed and ordered appellant to answer each question as it was put to him. Appellant nevertheless persisted in his refusal to answer.

After appellant had followed this pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings. The Commission thereupon moved in the Supreme Court, New York County, for an order pursuant to Section 406, New York Civil Practice Act, directing issuance of a warrant to confine appellant to New York Civil Jail until "he answers truthfully and responsively" the Commission's inquiries. After a hearing in the Supreme Court the Commission's motion was granted, and the order and warrant of commitment issued from that Court on August 22, 1959. Appellant was then committed.

With others similarly confined, appellant appealed this determination through the New York courts. But he did not join the others in seeking review in this Court of the final determination against him by the New York Court of Appeals on March 13, 1959. It is the opinions in this stage of the proceedings which are cited at page 3, *supra*, as *Commission of Investigation* v. *Lombardozzi, et al.*, (C. P. Volpati).

Appellant's Conduct at His Second Hearing Before the Commission

Rather than appeal to this Court with his fellows, appellant notified the Commission after the decision of the Court of Appeals that he finally wished to testify before the Commission in an effort to secure his release; he represented that he desired to satisfy the terms of the order and warrant of commitment which required him to respond "truthfully and responsively" (126).

At a hearing before the Commission on March 19 and 20, 1959 appellant gave some sort of responses to the various questions contained in the order of commitment, as well as related areas of inquiry (454-830). At the conclusion of appellant's testimony the Chairman of the Commission said in part:

> "As has already been clearly indicated on this record by Commissioner Lane and myself, and by counsel, it just taxes our credulity to believe that this man, as well as many of the others who told a similar story, just happened to pick November 14, 1957 to visit their sick friend, Joe Barbara. The story just doesn't have the ring of truth.

"I want to say to you, Mr. Valenti, that we do not believe you have told us the truth, but I just want to advise you that at any time that you are prepared to come forward and tell us the truth the Commission will be ready to hear you." (827-8).

It is the nature of appellant's testimony during this second hearing which has been the subject of extensive consideration and characterization by the courts of New York and resulted in the final order of the New York Court of Appeals from which appellant is appealing in this instance. The Supreme Court, New York County, the Appellate Division, First Department, and the Court of Appeals held appellant's testimony to be of such a specific factual nature as not to constitute compliance with the order and warrant of commitment; as a result, appellant was continued in confinement for the flagrant nature of his responses.

Indeed, every judge who applied the governing legal standard in New York found appellant's testimony such as to require his continued confinement. That standard has been adopted from the time honored law of criminal contempt in New York insofar as it applies to the nature and quality of testimony: "false, evasive and obstructive of the inquiry." The minority of the Court of Appeals attempted to establish an entirely new and novel standard by which testimony would be measured, and their factual determination is restricted to measurement against their statement of their new standard.

Appellant's Conduct at His Third Hearing Before the Commission

On December 8, 1959, appellant received a third hearing before the Commission to "affirm, change or modify" the testimony he gave during the second hearing.

This testimony is not set forth in the record on appeal filed with the Court in this proceeding, and is brought to the Court's attention because events subsequent to the printing and filing of that record on appeal, and appellant's Jurisdictional Statement, concerning the second hearing are of such significance and so controlling that justice so requires.

At the outset of the third hearing appellant's counsel listed a number of respects by which appellant wished to change his prior testimony at the second hearing. Only several of those areas were material to the pertinent aspects of the Commission's inquiry. After appellant so testified, the Commission again refused to consent to his release.

Immediately after this third hearing a writ of habeas corpus was obtained on behalf of appellant to raise the issue of his continued confinement under the aforementioned order and warrant. After a hearing, the Supreme Court, New York County, rejected this claim and dismissed the writ, the result being a determination that in the opinion of the Court, appellant should be continued in confinement. The Court held appellant had not significantly altered his position so as to bring him outside the holdings as to his prior testimony.

On December 11, 1959, appellant sought *and obtained* bail in the sum of $15,000 pending appeal to the Appellate Division, First Department, from the lower court's decision as to this third stage of the entire proceedings. The Jurisdictional Statement was filed with this Court only several days before appellant was released on bail. Contrary factual representations in the Statement concerning appellant's continued confinement, therefore, (as at pages 6 and 8) are no longer true.

ARGUMENT

POINT I

The appeal is moot and premature.

Appellant's subsequent attempt in the New York courts to seek his release under Section 406 of the Civil Practice Act, the same statute which he attacks here as unconstitutional, requires the dismissal of his appeal on two legal grounds:

A. The Appeal is Moot:

The crux of appellant's position in this Court is the alleged unconstitutionality of a New York statute, Section 406. But after setting forth that position in his Notice of Appeal to this Court, he proceeded in the New York courts once again to invoke the same statute to secure his release. This attempt was made after his third hearing before the Commission and is now before the Appellate Division, First Department. Thus, there no longer is an actual case or controversy before this Court. By his inconsistent action appellant has waived his legal position and rendered his

appeal moot. See *Castellano* v. *Commission of Investigation*, 361 U. S. 7 (1959).

B. The Appeal is Premature:

Appellant is engaged in proceedings in the New York courts which, if successful, threaten to frustrate and make totally ineffective a final decision of this Court. Indeed, this appeal is but another extension of the "second stage" of this proceeding, whereas appellant's present State actions already have entered the "third stage".

Under such circumstances this Court should exercise its discretion not to entertain this appeal.

POINT II

The Federal questions here alleged by appellant were never raised nor passed upon in the New York courts.

Appellant has failed to comply with the essential jurisdictional burden placed upon him by Title 28, United States Code, Section 1257(2), codified in Rule 15(d) of the Revised Rules of this Court, to wit, that he demonstrate "affirmatively" and "positively" that the Federal questions alleged as the jurisdictional basis for the appeal were raised and passed upon in the State courts below. *Live Oak Water Users Ass'n* v. *Railroad Commission of California*, 269 U. S. 354 (1926); *Oxley Stave Company* v. *Butler County*, 166 U. S. 648 (1897).

But it would be impossible for appellant to make such a showing since no Federal question was ever

raised or passed upon below. A search of the entire record and all the New York court files in this proceeding reveals it to be barren of such prior claims. Apparently appellant's sole jurisdictional reliance in this regard is based upon the use of the phrase "due process of law" in the minority opinion of Judge Froessel of the New York Court of Appeals. But that passage, and Judge Froessel's entire opinion, contain no reference to the United States Constitution and there is no such reference in the remittitur or final order of that Court. It is impossible to say that the Court of Appeals considered a Federal "due process" issue. Under these circumstances, the reference to "due process" in Judge Froessel's opinion will be presumed, as certainly it must, to refer to State procedure and State due process if it contains no explicit reference to Federal issues. *Bowe* v. *Scott*, 233 U. S. 658 (1914); *Osborne* v. *Clark*, 204 U. S. 565 (1907).

POINT III

Appellant's basic dispute is with a factual determination against him by the State courts and does not involve a Federal question.

In the stage of these proceedings of which appellant now makes complaint, the New York courts have made a definitive factual determination that the nature and quality of his responses to the Commission's inquiries concerning the Apalachin Meeting were false, evasive and obstructive of the Commission's inquiry. Appellant's confinement has been continued solely as a result of that factual determination. In reaching that

determination the New York courts also determined several matters of New York civil procedure by which Section 406 proceedings such as this are to be governed in the New York courts; those civil procedural matters are the sole concern of the courts of New York.

The substantive standards by which the nature and quality of appellant's answers were measured were taken by the New York courts from the traditional law of contempt as it has existed in New York for several centuries. There is nothing new, novel or unfair about that standard. To the contrary, every one of the six other witnesses similarly confined with appellant in August 1958 has obtained his release from confinement under the identical substantive standards and procedures. The Commission opposed the release of those witnesses and the New York courts have ruled to the contrary. Thus it could not be more certain that it is not the legal procedure that is "unfair" or hopelessly enmeshes appellant for a "term of life imprisonment" without the basic or fair procedural safeguards to which he is entitled. Rather, it is the factual characterization of his particular answers to the Commission's specific questions and in that context this Court should not be concerned with or exercise its discretion to review such a purely factual determination by state courts.

POINT IV

In any case, the alleged Federal questions are not substantial or worthy of consideration by this Court.

In his Jurisdictional Statement appellant raises a large number of alleged Federal questions. These alleged Federal questions are insignificant, unsubstantial and largely duplicitous; in addition, they were not raised below, as discussed previously. Each of these questions is considered in the order they are set out in the Index to the Jurisdictional Statement.

1. "May a statute, imposing a life sentence, demand compliance, without setting forth the manner, method and by whom compliance shall be determined."

The manner of determining compliance with a Section 406 order is the same as for any other order of a court, to wit, the court itself decides whether the facts presented to it constitute compliance. The method used to determine compliance also is the same as for any other order of the court, to wit, presentation to the court through affidavit or otherwise of the facts of alleged compliance or non-compliance; the New York Court of Appeals held this procedure was to be followed in Section 406 proceedings. *People ex rel. Falk* v. *Sheriff*, 258 N. Y. 437 (1932).

Moreover, Section 406 does not impose a "life sentence." Appellant may be released by simply telling the truth. "The keys to his prison are in his pocket." *Penfield* v. *Securities & Exchange Commission*, 330 U. S. 585, 590 (1947).

2. "May such statute fail to provide a guide revealing the fact or failure of compliance."

Section 406(3) itself states the "guide" for compliance is whether the witness "refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper . . . ." The New York cases interpreting this and similar statutes are legion and it has been established that answers which are false, evasive and obstructive of the inquiry are tantamount to refusal to answer. Such a standard meets all legal requirements and was applied in this case. *People ex rel. Valenti v. McCloskey and Commission of Investigation, supra.*

3. "May a summary commitment, based on a contempt outside the court, be allowed without Due Process of Law and without informing the contemnor as to what is required for compliance".

This statement has no relation to the facts of this or any other Section 406 case. First of all, appellant's conduct, is not "a contempt outside the court." Secondly, at all stages of this proceeding appellant has known exactly what he was being questioned about and why he was before the Commission. Moreover, the specific questions which form the legal basis for his commitment are contained in the very order and warrant of commitment which appellant has diligently studied for the sixteen months of his confinement for refusing to make truthful and responsive answers to them. Finally, Section 406 is an admittedly coercive but civil statute; it is not criminal and does not impose punishment in the sense of criminal sanctions. This type of issue was raised in this Court by the four

other witnesses who sought review in this Court, either by certiorari or appeal; each was denied or dismissed and the Commission's briefs in those cases discuss various aspects of this alleged point at length if further reference is thought desirable. (Certiorari: Miranda, No. 893, October Term, 1958; Riccobono, No. 935, October Term, 1958; Castellano, No. 940, October Term, 1958. Appeal: Castellano, No. 72, October Term, 1959; Mancuso, No. 117, October Term, 1959.)

4. "Does not a statute provide for unbridled discretion when it subjects a witness to the whim of Court and Agency"?

The Commission's determination concerns only the question of whether or not the Commission shall consent to appellant's release. That determination is in no way binding upon the courts, which make independent determinations of the facts of each case. *People ex rel. Valenti* v. *McCloskey and Commission of Investigation, supra; People ex rel. Falk* v. *Sheriff, supra.* The discretion of the Court is narrowly confined to factual determinations within the orbit of the controlling procedure and substantive standards established in New York; this is not "unbridled discretion" by any analysis, nor is anyone being subjected to the "whim of Court and Agency."

5. "May perjury be punished as a contempt".

There is no such issue in this case for appellant has not been charged with or tried for perjury or contempt. But even if that were the case, it is obvious a witness by his testimony may commit both perjury and contempt at the same time and be subject to pun-

ishment for both. Furthermore, testimony may be such as to make a witness subject to a Section 406 proceeding as well, where the objective is not punishment (as is the case with perjury or contempt) but civil coercion as a means for compelling testimony. See *Ex Parte Hudgings*, 249 U. S. 378 (1919).

6. "May perjury be exacted as the price of compliance".

There is no such issue in this case. The object of the Commission and the courts is to exact complete and truthful disclosure from a wilful and contumacious witness who seeks at all costs to avoid so testifying although clothed with immunity. The Commission and the courts have not the slightest interest in exacting false answers or perjury.

7. "May a life sentence be imposed without providing for a hearing, the taking of testimony, etc."

The many hearings—judicial, and before the Commission—at which testimony was received from appellant and considered by the courts, raise questions as to the seriousness and responsibility of appellant stating unfounded conclusions and attempting to make an issue here out of whole cloth.

8. "May the witness remain in confinement despite the fact that the basis of confinement has become academic".

The substance of this alleged Federal question is appellant's assumption that the Commission already has obtained from other sources the information it

seeks to obtain from appellant. This is not so. But even if it were, the Commission still has an absolute right to question appellant about those events for purposes of confirmation, possibly securing additional leads and for all the other obvious purposes for which investigations are conducted.

9 and 10: "May the scope of a statute and the order thereunder be extended to include matter not essential to determine the fact of compliance".

"May reliance be had on the entire record to ascertain the fact of compliance".

The Courts below, in deciding appellant did not comply with the order of commitment, considered only answers to the 26 and related questions. These related questions which were considered were those which "explore[d] the immediate answer given to any specific question . . . to test the scope of the denial or affirmation". (Opinion of Mr. Justice Breitel, 931-2). In any case, the question is not a constitutional one to concern this Court but merely a relatively minute question of State procedure.

Conclusion

Appellant has failed to satisfy the jurisdictional requirements of Title 28, United States Code, Section 1257(2) and this appeal should be dismissed.

No substantial Federal question worthy of consideration by this Court is raised in any event, and the appeal should be dismissed.

Should this appeal be treated as a petition for a writ of certiorari, the petition should be dismissed.

Respectfully submitted,

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